only $1,000 refused); Gasque *v.* Small, 2 Strobh. Eq. 78 (specific performance of contract to convey real estate at about one half its real value refused); Hodgson *v.* Farrell, 15 N. J. Eq. 88 (execution sale of property worth $1,200 for $400); Grizzle *v.* Sutherland, 88 Va. 584, 14 S. E. 332 (contract to sell land for about 10 per cent of its value.)

Our own court has laid down the doctrine that to justify a court of equity in refusing specific performance to enforce a contract for inadequacy of consideration, such inadequacy must be so gross as to amount to evidence of fraud.

In Stearns *v.* Beckam, 31 Gratt. 389, the court says, "the unfairness which will disentitle a plaintiff to call for specific performance at the hands of a court of equity, may be either in the terms of the contract itself, or it may be in matters extrinsic and the circumstances under which it was made. The unfairness may not amount to actual fraud; for there are many instances in which, though there is nothing that actually amounts to fraud, there is nevertheless a want of that equality and fairness in the contract which are essential in order that the court may exercise its extraordinary jurisdiction in specific performance. * * * Inadequacy of consideration, unconnected with any other circumstance, constitutes no valid objection to the specific execution of a contract through the medium of a court of equity unless the inadequacy be so great as in itself to be sufficient evidence of fraud." See also, Terry *v.* Coles, 80 Va. 700; Hale *v.* Wilkinson, 21 Gratt. 75.

In White & Wife *v.* McGannon & al., 29 Gratt. (Va.), 511, the court held that though it appears that the price contracted to be given for the land was double its value, yet as the purchaser was fully competent to contract, and there was no fiduciary relationship between him and the vendor, and very brief acquaintance, and the purchaser made his own examination of the land, though it was mostly covered by snow; in the absence of all fraudulent representations on the part of the vendor the contract will be enforced.

BUCK *v.* COMMONWEALTH.

Nov. 12, 1914.

[83 S. E. 390.]

1. Criminal Law (§ 752*)—Testimony of Accused—Weight—Demurrer to Evidence.—Where accused testified in his own behalf and his evidence was not contradicted nor in conflict with any other evidence, he was entitled to have it accepted as true on a demurrer to the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1725, 1726; Dec. Dig. § 752.*]

2. Escape (§ 7*)—Persons Liable—"Accessory After the Fact."—One cannot be convicted as an "accessory after the fact" in an escape, unless what he did was done by way of personal help to his

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

principal, with a view to enabling him to elude punishment.

[Ed. Note.—For other cases, see Escape, Cent. Dig. § 8; Dec. Dig. § 7.*

For other definitions, see Words and Phrases, First and Second Series, Accessary after the Fact.]

3. Escape (§ 10*)—Accessory—Evidence.—In a prosecution for aiding another to escape from justice after committing a crime, evidence held insufficient to justify a conviction.

[Ed. Note.—For other cases, see Escape, Cent. Dig. §§ 17, 18; Dec. Dig. § 10.*]

Error to Circuit Court, Craig County.

B. W. Buck was convicted of aiding in the escape of one Harvey D. Looney, and he brings error. Reversed.

W. E. Allen, of Covington, and *John L. Lee,* of Lynchburg, for plaintiff in error.

The Attorney General, for the Commonwealth.

CARDWELL, J. Harvey D. Looney, on the night of June 16, 1912, shot and fatally wounded one Oscar M. Martin, in the town of New Castle, Craig county, and by flight temporarily escaped arrest for his crime. On the following day a justice of the peace of Craig county, upon complaint made to him, issued his warrant for the arrest of B. W. Buck, charging that Buck had "received, harbored, maintained and concealed the said Harvey D. Looney, and that he, the said B. W. Buck, has assisted the said Harvey D. Looney in escaping and evading arrest for the said felony committed by him." Buck was arrested and brought before the justice on the date of the warrant, but he case was continued from time to time until August 30, 1912, when a trial was had and judgment rendered against the accused that he be confined in the jail of Craig county for a term of six months and pay to the commonwealth of Virginia a fine of $300, from which judgment Buck appealed to the circuit court of Craig county, and upon a new trial of the cause before a jury in the circuit court, on November 14, 1912, Buck was found guilty and his punishment ascertained to be a fine of $450 and confinement in the county jail for 10 months, upon which the circuit court entered judgment, and to which judgment a writ of error was awarded to the defendant by this court.

The only assignment of error requiring consideration relates to the action of the trial court in overruling plaintiff in error's motion to set aside the verdict of the jury as contrary to the law and the evidence and in entering judgment thereon.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

The only evidence relating to the alleged connection of plaintiff in error with the temporary escape of Looney after the latter had, about 11 o'clock on the night of June 16, 1912, fatally shot and wounded Oscar M. Martin, the town sergeant of New Castle, consists exclusively of plaintiff in error's own evidence given upon his trial in the circuit court, his own statements made the morning after the shooting as related by Wiley Martin, a brother of Oscar Martin, who had died during the night, and G. W. Layman, witnesses for the commonwealth, and the evidence of Lee Looney, the brother, and Henry Looney, the father, of Harvey Looney, also witnesses for the commonwealth, the two latter testifying as to what transpired when plaintiff in error and Harvey Looney arrived at the home of the father about an hour after the shooting of Oscar Martin.

It appears that Harvey Looney was in the town of New Castle, drunk and very disorderly, on the afternoon and evening that he shot Martin, who made an effort to arrest him; that plaintiff in error resided at New Castle, and had been acquainted with Looney for about four years, and had seen him at New Castle several times in the afternoon preceding the night of the shooting. During that afternoon on more than one occasion Looney had cursed and abused plaintiff in error very violently, as he had done others in his drunken frenzy. That evening plaintiff in error, as was his custom, went to Craig City, only a few minutes walk from New Castle, to look after some horses which he kept there, and the substance of the statements made by him upon his trial in the circuit court is as follows: He turned out three of his horses in a little field to graze, and left two in the stable. A little later, because of a threatening storm, he tried to catch one of the horses, a sick one, which he had turned out, but failed. While so engaged and when near a Mr. Caldwell's house, he heard five shots fired. Failing to catch the horse and a storm coming up, he started back to New Castle. When "between the bridges" he met Harvey Looney "running very fast." He hailed him, saying, "Who is that?" and Looney replied, "Is that you, Ben?" Upon being answered "Yes," Looney said, "Don't you move. I have got you covered and my finger on the trigger." Looney then passed him a few feet, whirled, put a pistol at his breast, and demanded that he get him (Looney) a horse, saying he was in trouble, and that if he (Buck) did not get him a horse, he would kill him; that although he (Buck) had two horses in the stable, he told Looney he had none, that they were turned out. Looney then demanded, with a threat to kill if disobeyed, that he (Buck) catch one for him; that he (Buck) got a bridle out of the corncrib and pretended to try to catch one of the horses, but struck him on the nose so that he whirled and ran away, whereupon Looney cursed him, saying that he

had not tried to catch the horse, and then, with violent threats and a pistol still in hand, said that he could get a horse at home, and that he (Buck) had to go with him or he would kill him, for if he left him behind he would tell on him (Looney); that he (Buck) tried to beg off, but was compelled to go, and on the way to the home of Looney's father he demanded that he (Buck) give up his pistol, which he did; that Looney told plaintiff in error that he had shot Oscar Martin, and when the Looney home, about 1½ miles from New Castle, was reached, Looney awoke his brother, Lee Looney, told him he was in trouble, and demanded a horse upon which to get away. Lee Looney got up, caught, bridled, and saddled a horse which Harvey Looney, after providing himself with food and some money gotten from his mother, mounted and rode away. This was at a late hour, about midnight or after, and plaintiff in error spent the remainder of the night at the Looney house, returning to New Castle early in the morning. No one saw plaintiff in error and Looney when they met after the latter had shot Oscar Martin, or at any time while they were together that night, or heard a word that passed between them while they were on their way to the Looney home. When the Looney home was reached, and while Looney was getting something to eat and his money, about an hour after the shooting, plaintiff in error told Harvey Looney's brother, Lee, that he (plaintiff in error) had been forced, "at the point of a gun," to accompany Harvey Looney to his father's home to get a horse, which fact is testified to by Lee Looney, and both he and his father, testifying for the prosecution, say that plaintiff in error, after reaching their home, did nothing whatever to aid or encourage Harvey Looney in making his escape. These witnesses also testify as to Harvey Looney's drunken condition, and that plaintiff in error had reasonable apprehension of being shot if he had refused to accompany him to his father's home to get a horse; Lee Looney stating that he regarded it safest to let Harvey Looney have the horse, etc.

At an interview sought by plaintiff in error with Wiley Martin, G. W. Layman, and several others the next morning after the shooting, he undertook to relate to these men just what had occurred between him and Harvey Looney the night before, and while Wiley Martin and Layman, when testifying for the prosecution, make it appear that the statement then made by plaintiff in error did not accord altogether with his testimony given in court, there is not any material difference in the two statements. On the contrary the statement made by plaintiff in error at that interview, as testified to by Wiley Martin and Layman, corroborates rather than discredits the statements made by plaintiff in error in court. Not only so, but both the witnesses say that

they can only give in substance the statement voluntarily made by plaintiff in error in Judge Jones' office in the presence of themselves, Judge Jones, and others. Wiley Martin states that plaintiff in error said to him that morning:

"'I want to have a talk with you, George Layman, Judge Jones, and Ed. Smith, all together; I think I can give you a few points.' I [Martin] says, 'All right, Ben, I will appreciate any information we can get.'"

Layman testifies that plaintiff in error informed him also of the proposed interview in Judge Jones' office. As stated, Martin and Layman, as witnesses for the prosecution at the trial of plaintiff in error, related the statements made by him in their presence and in the presence of Ed. Smith and Judge Jones in the latter's office. While the statements made by these witnesses, as to what plaintiff in error on that occasion said, go more into detail as to what his statement was than he did when testifying in court, there is practically no conflict between the two statements made by him with respect to the material facts being inquired into. The matter being inquired into was: Had plaintiff in error personally helped Harvey Looney in escaping or evading arrest for the felony committed by him; that is, the fatal wounding of Oscar Martin? There was some evidence offered for the prosecution for the purpose of contradicting some of the statements made by plaintiff in error in Judge Jones' office, which evidence had reference to certain statements made by plaintiff in error upon his return to New Castle the next morning after the shooting, and to the effect that he had not, before that time, known of the shooting of Oscar Martin, when in fact Harvey Looney had told him, on the way to his father's home, that he had shot Martin. The witnesses for the prosecution say that there was the greatest excitement among the citizens of New Castle after this shooting, and though plaintiff in error may have stated to certain persons that he had not known of the shooting until that time, the fact remains that he sought the brother of the man that had been shot, and through him and George W. Layman arranged a meeting with them and others in Judge Jones' office before whom he proposed to and did relate what he knew about Looney's escape, the purpose of which could have only been to assist the officers of the law in their efforts to bring about the capture of the escaped culprit. To give all the evidence in contradiction of plaintiff in error the fullest weight, it at most could only serve to excite suspicion as to his veracity, and cast doubt upon the account he subsequently gave of his conduct. But suspicion however grave, does not warrant a conviction. To justify a conviction for any offense, the facts necessary to establish guilt must be proven beyond reasonable doubt.

There is no evidence whatever in the record tending to prove

a motive on the part of plaintiff in error in committing the offense with which he is charged, and it is to be borne in mind that the voluntary statements he made to others in Judge Jones' office and testified to at his trial constitute the only proof in the case as to what occurred between the time of his meeting with Looney "between the bridges," after the shooting of Oscar Martin, and the time at which Looney rode away on his father's horse from the Looney home, and as to which statements there is no contradiction whatever.

Nor is there the slightest intimation in the record that plaintiff in error entertained any unkind feeling toward Oscar Martin, deceased, or that he had any reason to even feel kindly toward Looney who, as it affirmatively appears in the record, had violently cursed and abused him but a few hours before the shooting of Martin, and without provocation.

[1] Though the case has to be considered as upon a demurrer to the evidence by plaintiff in error, he is not required to waive his own evidence as to which there is no conflict or contradiction, and such evidence is to be accepted as true.

[2] In Wren *v.* Com'th, 26 Grat. (67 Va.) 952, the question as to what proof is necessary to convict one charged with the offense of which plaintiff in error here stands convicted in the circuit court is very fully discussed, and the court said:

"The true test whether one is accessory after the fact is to consider whether what he did was done by way of personal help to his principal, with the view to enabling his principal to elude punishment, the kind of help being unimportant."

[3] In the case here, the evidence, as we view it, fails utterly to prove any act on the part of plaintiff in error in the way of help to Looney, with a view of enabling him to elude punishment. The prosecution itself proved that early next morning he reported the escape of Looney, when and by what means he had left the vicinity, and it is not proven that plaintiff in error did anything whatever, by way of person help to Looney, with the view to enabling him to elude punishment. All that he did, according to the proof, was to go with him, under duress, from a point "between the bridges" to the Looney house, where the Looneys provided all the means necessary for him to make a temporary escape, without any sort of assistance from plaintiff in error. Had the latter not reported the escape of Looney to the authorities, his failure would not have constituted the crime charged against him, or any crime. Wren *v.* Com'th, supra.

We are of opinion that the judgment of the circuit court complained of should be reversed, the verdict of the jury set aside, and the cause remanded for a new trial, if the circuit court and prosecuting attorney consider that a better case against plaintiff in error can be made out.

Reversed.